No. 12,537

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,	*Appellant,*
vs.	
NIELS K. WIBYE,	*Appellee.*
UNITED STATES OF AMERICA,	*Appellant,*
vs.	
HAROLD WIBYE,	*Appellee.*

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

APPELLEES' STATEMENT OF THE CASE.

We believe that appellees' statement of the case can be distinguished, among the material parts, by the following:

1. The direct route from Lathrop (near Stockton) to Fort Lewis (near Tacoma) is not through San Francisco. As appellees admitted, it is approximately sixty miles longer. The direct route is Stockton, Sac-

ramento, Redding over Highway 99. Appellee states (p. 4): "The route he (Hadley) was pursuing would take him to Fort Lewis * * *". We doubt this. The route he was taking would take him to San Francisco, and if still pursued, into the Pacific Ocean. We do not know where he was going after dinner with his mother in San Francisco. We do know he was supposed to go from Stockton to Fort Lewis. Therefore it must appear that Hadley was going out of his way to have dinner with his mother, a natural desire on the part of a son, but which would retrace his route, in that he would go to Sacramento, if he took the best, shortest and most practical route. It would have given him more time if he needed sleep as indicated by appellees in their brief, if he had eliminated San Francisco.

2. Appellees stress (p. 3) that Hadley was on business in San Francisco besides having dinner with his mother and state the entire testimony shows that Hadley was going to the "Finance Office" not "Finance Company". This seems to us relatively unimportant, for although it appears the words "Finance Office" and "Finance Company" were used interchangeably by his mother, there is no doubt he was going to either one or the other to cash his own personal check, and hence on his own business and not that of the Government. This is the uncontradicted testimony. (R.T. 161.) We quote:

> "Q. Did your son say that he was going to cash a check at the Finance Company?
>
> A. He did.

Q. (by appellees' attorney). Well now in your last answer you said something about picking up a check.

A. Well he didn't say anything about picking up a check. He did say something about cashing a check though."

It does not seem necessary to point out that Hadley would not have to cash his check on Government business nor go sixty miles away from a U.S. depot to do so.

(3) Relative to the Government stipulation referred to in appellees' brief (p. 3), the stipulation was as follows (R.T. 205):

"Court. You are satisfied that the Government can stipulate that Hadley left Seattle with this car, which was a Government car which he was entitled to use, and he drove with that car down to Stockton * * * and he was going to drive back with it to——

Mr. Richard. *'Fort Lewis'* * * *

Mr. Deasy. Fort Lewis in *accordance* with his itinerary." (Italics ours.)

WAS HADLEY ACTING WITHIN THE COURSE AND SCOPE OF HIS EMPLOYMENT?

Appellees say it was their and the trial Court's position that Hadley was authorized to go to San Francisco and at the time of the accident was on Government business; that appellant's position is that because of Hadley's choice of routes it was not in the

course and scope of his employment. We prefer our own brief statement of our position, to-wit: That Hadley was not in the course (digression of sixty miles, etc.), nor in the scope (going to dinner with his mother, etc.) of his employment.

Appellees then state (pp. 10-22) that the Government's failure to produce instruction to Hadley may properly be inferred as unfavorable. In the first place we produced his instruction to go from Stockton General Depot to Fort Lewis. It did not say direct, because that is certainly an implied instruction in the Army. You do not send a battalion to fight North Koreans via New York. The Court will take judicial knowledge that all Army personnel (civilian or troop) are supposed to comply with its regulations and its use of words. Secondly, we know of no other instructions or that any other instructions were necessary.

Army Regulations 850-15 state:

> "(c) Motor Vehicles will be used *only for official business* * * *".
>
> "(d) Government owned or Government leased motor vehicles will not be used to transport civilian or military personnel between their places of residence and business except on emergencies or in the following cases * * *. (3) military or civil personnel engaged in field work, the character of whose duties makes such transportation necessary and then *only* in such cases as are approved by the Secretary of War." (Italics ours.)

Appellees could have easily ascertained if Hadley was given permission to visit San Francisco. Perhaps they did and found out it was adverse, or perhaps they were afraid to try, however be it as it may, we know of nothing except the direct instruction for Hadley to go from Stockton to Fort Lewis. We prefer the record to unknown conjectures and the record shows Hadley was furthering his own business or pleasure at the time of the accident, unknown to his employer. There is nothing in the record to show otherwise.

It certainly cannot be contended that the Army approved Hadley's going to San Francisco on his own business nor was it approved by the Secretary of War. Army Regulations have the same force and effect as law.

Hironimus v. Durant, 168 F. (2d) 288;
Gratiot v. U. S., 45 U.S. 80.

If we were to assume that it was not a deviation sufficient to take Hadley out of the course of employment, yet it was sufficient surely to take him out of the scope of employment. The law reads "course" and "scope". Hadley was not furthering his employer's interest when he went to San Francisco to cash his check or to have dinner with his mother. It was not connected with his employment but was for the employee's particular and personal benefit.

As cited in our opening brief, there are many cases similar in principle, if not the exact facts, of the

Wibye case. We will only burden the Court with a few more:

Bayless v. Mull, 50 C.A. (2d) 66, 122 P. (2d) 608.

There an auto salesman went out to see a sale prospect. On his way he stopped for dinner with a friend and then drove past the prospect's home in order to take his friend home. Held not in the course or scope of employment.

Also

Kruse v. White, 253 Pac. 178,

and two cases on page 13 hereof.

We may also point out there is no evidence as to whether Hadley was in fact working at the Stockton Quartermaster Depot on November 8, 1946. Appellees state inferences were discarded by the trial Court. The only evidence is that Hadley was going to see his mother and might stop off and cash a check. The time at which his mother expected him was approximately one hour after the time the accident happened. The Court can take judicial notice of the fact that the site of the accident was, roughly, one hour's driving distance from San Francisco.

What conclusion can be drawn from this? It seems to us that it was only on Hadley's personal business, as aforesaid. Appellees could have produced at the trial, if so, testimony that Hadley was working on that day or if he was visiting San Francisco on any other business but his own. Appellant knows of no reason for him to visit San Francisco but his own

business or pleasure. Having failed to show otherwise, they ask this Court to speculate and conjecture that Hadley might have been on Government business. There is, further, no evidence that Hadley was actually going to Fort Lewis by way of San Francisco. The evidence is that he was going to San Francisco on his personal pleasure.

Appellees contend (pp. 8-9) that Hadley was authorized to return to Fort Lewis via San Francisco because he had a choice of routes, as the Court found, and that his going to dinner in San Francisco with his mother was immaterial as he was in the course and scope of his employment. We disagree, (a) for the reason heretofore stated; (b) no evidence; (c) Hadley was not furthering his employer's business, which is the basic law; (d) under the cases cited a slight deviation to have dinner with a friend was held not within the course and scope of his employment: (e) the trial Court did not find Hadley had a choice of routes. It found (R.T. 33) "* * * upon completion of his assignment at Lathrop, California, to return to Fort Lewis, Washington * * *". There is nothing about a choice of two main routes, as contended by appellees. As a matter of fact there is only one main direct route from Stockton (Lathrop), as we have pointed out. The appellees challenge appellant to point out the error of the trial Court in this finding. There is no error. We agreed he was to go to Fort Lewis, as distinguished from San Francisco. Our objection to the trial Court finding is that having found he was to return to Fort Lewis, it found that

going to San Francisco on personal business was within the course and scope of Hadley's employment at the time of the accident. (Par. 3 of the Findings; R.T. 33.) Their next contention is, in effect, that Hadley's instructions were within the knowledge of his superiors. This puzzles us as we offered to abide by the instructions given Hadley but we maintain Hadley had no instructions to go to San Francisco to have dinner with his mother or perhaps to cash his check. Certainly he could have cashed a check at Lathrop when he was known (not go 60 miles to do so), and as stated, an authorization for such a deviation would have to come from the Secretary of War. We, of course, can show no authorization from anyone in the Army as none was given, and the appellees show none for the same reason, yet appellees say it must be construed unfavorable to appellant. If Hadley was not authorized to do so, he certainly was prohibited as the Court can take judicial notice that Government employees are authorized as to what they are to do and, *a fortiori,* cannot do what is not authorized. It is true that Hadley was not directed to return by way of Sacramento, Redding and Medford, but that is the direct route and we believe it can be taken as true that Hadley was to return by the most direct route unless otherwise instructed. (See page 5 of this brief.) It certainly is presumed. Where is the line of demarcation? If he could deviate 60 miles, could he deviate 160 miles? The answer is—was it furthering his master's business. It is a public vehicle and comes under closer scrutiny of its use than a private

one, because of the Government's immense scope pertaining to 150 million people.

Appellees cited *Ryan v. Farrell* as the case in point (p. 12) but in the extract cited it states unless it appears that "the servant could not have been directly or indirectly serving his master". We believe that going to dinner with one's mother is not directly or indirectly serving the master (the Government). Appellees state Hadley had a "roving commission". (p. 13.) There is no evidence of this. The only evidence on which appellees base this is that Hadley was given in advance of leaving Seattle, an itinerary for the entire month of November, i.e., where he was to go. It provided for traveling from Stockton to Fort Lewis, Washington, on November 7 and 8, 1946. We do "fail to recognize" that this permits him to travel where he pleased. We repeat, there is no evidence of a "roving commission".

Appellant then concludes (p. 14) that "there was evidence to justify the conclusion that Hadley had business in San Francisco to transact with the Finance Office, and on this ground alone was in the course and scope of his employment". It seems unnecessary to repeat that *if* Hadley had business in San Francisco with a Finance Company or Finance Office, it was solely and absolutely his own business, to-wit, the cashing of his own personal check. Appellees state: (a) "we appear to object to Hadley's mother's testimony". We do not; (b) that the trial Court did not rely upon any preferences or presumptions. If so, our point is conceded; (c) that without the testimony of

Hadley's mother, the itinerary was sufficient and the appellant did not object to it. We repeat we did not object. We would have offered it. It is strong evidence of our position for the reasons stated. Appellees' dependence on the itinerary to prove Hadley was acting in the course and scope of his employment, in our opinion, shows the weakness of their position.

DISCRETIONARY.

Assume, as appellees contend, it was a discretionary duty with Hadley. If so, the act particularly exempts the Government from any liability for any discretionary act of its employees.

Under the heading "Exceptions" it is stated (Sec. 2680(a)):

> "The provisions of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government * * * based upon the exercise or performance or the failure to exercise or perform a *discretionary function or duty* on the part of a Federal Agency or an employee of the Government, whether or not the discretion involved be abused". (Italics ours.)

This was interpreted in

Denny v. U. S., 171 Fed. (2d) 365;
Hendrick v. U. S., 82 F. S. 430;
Griggs v. U. S., 178 F. (2d) 1;
Thomas v. U. S., 81 F. Sup. 881;
Sickman v. U. S., decided by 7 C. Ct. 10-24-50.

(Parenthetically it may be noted that this exemption lends emphasis to the proposition that the plaintiff must prove that a Government employee was acting in the course and scope of his employment. If the Government is bound by any act of its employees, we can see where the Government would eventually go out of existence.)

Appellees claim that the Tort Claims Act is to be liberally construed. The Act's legislative history shows otherwise. The canon of construction which teaches that legislation of Congress should be strictly construed, has, we believe, been affirmed in the Supreme Court case of

U. S. v. Spelar, 93 L. Ed. 1105.

The Act was to provide a more satisfactory system for redressing Government torts than that provided by private bills, relieve Congress of the same and pass it on to the judges of the Federal Court. (Hence no juries were permitted and the attorneys' fees limited.) At first it was to be handled by the U. S. Employees' Compensation Commission but it was later changed to the present form. There are many Appellate Court decisions as to whether it should be liberally or strictly construed. The appellees cited

Spelar v. U. S., 171 F. (2d) 208,

as to liberality. However it is noted that the Supreme Court granted certiorari (93 L. Ed. 1105, supra) and the reason we believe it did so was that the Appellate Court may have been too liberal in its interpretation. In any event the case was reversed by the Supreme

Court. As stated in *Cropper v. United States,* 81 F. S. 81, 82—

> "In construing the Tort Claims Act, however, it must be kept in mind that the Government has waived sovereign immunity to suits *only as to claims falling squarely within the four corners of the Act",*

or as Judge Bone of this Appellate Court said in a case cited by appellees:

> "The sovereign surrendered its immunity to suit *only* where the act in question is performed within the scope of (here Army) employment". (Italics ours.)

The Supreme Court in

U. S. v. Sherwood, 312 U.S. 584, 590,

passed on this point when it stated that statutes which relinquish the immunity of the sovereign must be strictly interpreted.

APPELLEES' STATEMENT THAT THEY ARE ENTITLED TO INFERENCE THAT HADLEY WAS ON BUSINESS OF EMPLOYER. (p. 18.)

Appellees state that the Court did not pass on any supposed inference that possession of an auto owned by the Government gave rise to an inference Hadley was acting for the Government but stated the trial Court passed this question as "other admissible evidence establishes liability".

Therefore we need not argue if there is an inference but need only refer to the "other evidence" but what

other evidence is there? There was no testimony or other evidence that Hadley was acting within the course and scope of his employment, unless appellees refer to the itinerary, which surely does not prove it. Appellees cited California cases that such an inference can be drawn from ownership of the automobile. There are also cases like

di Rebaylio v. Herndon, et al., 6 C.A. (2d) 567, 44 Pac. (2d) 581,

holding that driving is not *prima facie* evidence that it was being driven with the owner's permission.

Appellees say the California law applied. We agree *except* (a) where the Act specifically alleges certain things must be proven such as "acting within the course and scope of his office or employment"; (b) being a Federal Statute, the parties are bound by it and its exceptions and the Federal laws and decisions of the Federal Court relative thereto. However, as we have twice stated (page 6), the California law uniformly holds that the use of employer's automobile for the purpose of going to meals is not within the course and scope of his employment. We have heretofore cited numerous cases on this point but should the Court desire, here are two more:

Mauchle v. P.P.I.E., 37 C.A. 719, 174 Pac. 400;
Glough v. Allen, 115 C.A. 330, 1 Pac. (2d) 545.

Appellees state the "rule" (referring to Federal common law or the California law) is based upon logic, experience and fairness. We are willing to submit to the Court, if holding the Government liable in

this case would be logical, fair, or that experience justifies it.

Dated, San Francisco, California,
December 27, 1950.

Respectfully submitted,

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